

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JERRY LEE MORRISSETTE,

Petitioner,

v.

PERRY RUSSELL, *et al.*,

Respondents.

Case No. 3:21-cv-00189-ART-CLB

ORDER

This habeas matter is before the Court on Respondents' Motion to Dismiss (ECF No. 35). For the reasons discussed below, Respondents' motion is denied.

I. Background

Petitioner challenges a 2015 judgment of conviction imposed by the Second Judicial District Court of Washoe County. (ECF No. 33-12.) A jury found Petitioner guilty of Causing the Death of Another by Driving or Being in Actual Physical Control of a Vehicle While Under the Influence of a Controlled Substance and/or a Prohibited Substance. (*Id.*) The state court sentenced Petitioner to term of imprisonment of 96 months to 240 months. (*Id.*)

On appeal, the Nevada Supreme Court affirmed the judgment of conviction. (ECF Nos. 33-13, 33-30.) Petitioner filed a state habeas petition, which the state court denied. (ECF Nos. 33-35, 34-28.) The Nevada Court of Appeals affirmed the denial of relief. (ECF No. 34-47.) Petitioner initiated this federal habeas proceeding *pro se*. (ECF No. 1.) The Court appointed counsel and granted leave to amend the petition. (ECF Nos. 6, 14.)

In his second amended petition, Petitioner raises a claim of ineffective assistance of counsel with six subclaims and a claim that the cumulative effect of trial counsel's errors violated Petitioner's Sixth and Fourteenth Amendment

rights. (ECF No. 24.) Respondents move to dismiss the petition as a mixed petition containing unexhausted claims arguing that Grounds 1(B)-(F) and Ground 2 are unexhausted. (ECF No. 35.) Petitioner argues that Grounds 1(B)¹, 1(E), and Ground 2 as it relates to Grounds 1(B) and 1(E) are exhausted. (ECF No. 47.) Petitioner concedes that Grounds 1(C), 1(D), 1(F), and Ground 2 as it relates to 1(C), (D), and (F) were not presented to the Nevada state courts, but he argues that they are technically exhausted, and he can overcome the procedural default. (*Id.*)

II. Discussion

A state prisoner first must exhaust state court remedies on a habeas claim before presenting that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement ensures that the state courts, as a matter of comity, will have the first opportunity to address and correct alleged violations of federal constitutional guarantees. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). “A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999)). To satisfy the exhaustion requirement, a claim must have been raised through one complete round of either direct appeal or collateral proceedings to the highest state court level of review available. *O’Sullivan*, 526 U.S. at 844–45; *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc).

“Fair presentation requires that the petitioner ‘describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based so that the state courts have a “fair opportunity” to apply controlling legal principles to the facts bearing upon his constitutional claim.’” *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). A petitioner may reformulate

¹ In their reply, Respondents concede that Ground 1(B) was exhausted in state court. (ECF No. 50 at fn 1.)

1 his claims so long as the substance of his argument remains the same. *Picard v.*
2 *Connor*, 404 U.S. 270, 278 (1971). Thus, a petitioner may provide additional facts
3 in support of a claim to the federal habeas court so long as those facts do not
4 fundamentally alter the legal claim that was presented to the state courts. *See,*
5 *e.g., Vazquez v. Hillery*, 474 U.S. 254, 260 (1986).

6 “A claim has not been fairly presented in state court if new factual
7 allegations either ‘fundamentally alter the legal claim already considered by the
8 state courts,’ or ‘place the case in a significantly different and stronger
9 evidentiary posture than it was when the state courts considered it.” *Dickens v.*
10 *Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014). “[T]his rule allows a petitioner who
11 presented a particular [ineffective assistance of counsel] claim, for example, that
12 counsel was ineffective in presenting humanizing testimony at sentencing, to
13 develop additional facts supporting that particular claim.” *Poyson v. Ryan*, 879
14 F.3d 875, 895 (9th Cir. 2018) (quoting *Moormann v. Schriro*, 426 F.3d 1044, 1056
15 (9th Cir. 2005)). However, “[i]t does not mean ... that a petitioner who presented
16 an ineffective assistance of counsel claim below can later add unrelated alleged
17 instances of counsel’s ineffectiveness to his claim.” *Id.*

18 **a. Ground 1(E)**

19 In Ground 1(E), Petitioner alleges that trial counsel rendered ineffective
20 assistance for failure to ensure the jury received an intervening cause or
21 contributory negligence instruction. (ECF No. 24 at 17-19.) Petitioner asserts
22 that he properly raised this claim in his state habeas petition. (ECF No. 9-9 at
23 13-16.) He further asserts that he incorporated this claim on appeal. (ECF No.
24 34-40 at 41-44.)

25 Respondents argue that Petitioner did not fairly present this claim to the
26 Nevada appellate court. (ECF No. 50 at 2-3.) They assert that although Petitioner
27 on appeal “fault[ed] trial counsel for not choosing the right theory of defense
28 which would have entitled him to a supporting jury instruction,” Petitioner did

1 not allege that trial counsel was ineffective for failing to request particular jury
2 instructions as alleged in his second amended federal petition. (*Id.* at 3.)

3 The Court finds that Ground 1(E) is exhausted. On appeal from the denial
4 of his state habeas petition, Petitioner argued that trial counsel provided
5 ineffective assistance and that Petitioner had a proximate causation defense.
6 (ECF No. 34-40 at 41.) He asserted that “following a proper proximate causation
7 instruction, a reasonable juror could have concluded that it was unforeseeable
8 to [Petitioner] that [the victim] would do that, and with the benefit of hindsight,
9 abnormal, or extraordinary; and that her failure to yield to him occurred after
10 his failure to yield to her, not before,” and therefore, “a reasonable jury would
11 find [the victim] to be negligent and that her negligence was the proximate cause
12 of her death.” (*Id.* at 43.) In his reply brief, Petitioner further argued that
13 Petitioner “would have received a proximate causation instruction if one had
14 been tendered.” (ECF No. 34-43 at 12.) Accordingly, Ground 1(E) is exhausted
15 because Petitioner fairly presented it to the Nevada appellate court.

16 **b. Ruling on Grounds 1(C), 1(D), 1(F), and Ground 2, as it relates**
17 **to 1(C), 1(D), and 1(F) are deferred.**

18 Petitioner acknowledges that Grounds 1(C), 1(D), 1(F), and Ground 2, as
19 it relates to those claims, were not presented to the state courts but argues the
20 claims are technically exhausted as he can demonstrate cause and prejudice
21 under *Martinez v. Ryan*, 566 U.S. 1 (2012), to overcome the procedural default.
22 (ECF No. 47 at 10-19.) A federal court need not dismiss a claim on exhaustion
23 grounds if it is clear that the state court would find the claim procedurally
24 barred. *See Castille*, 489 U.S. at 351; *see also Dickens*, 740 F.3d at 1317 (“An
25 unexhausted claim will be procedurally defaulted, if state procedural rules would
26 now bar the petitioner from bringing the claim in state court.”). A claim may be
27 considered procedurally defaulted if “it is clear that the state court would hold
28 the claim procedurally barred.” *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir.

2002). Where a petitioner has “procedurally defaulted” a claim, federal review is barred unless he “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.” *Coleman*, 501 U.S. at 750.

“Generally, post-conviction counsel’s ineffectiveness does not qualify as cause to excuse a procedural default.” *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019) (citing *Coleman*, 501 U.S. at 754-55). However, in *Martinez*, the Supreme Court created a narrow exception to the general rule that errors of post-conviction counsel cannot provide cause for a procedural default. See 566 U.S. at 16-17. “Under *Martinez*, the procedural default of a substantial claim of ineffective assistance of trial counsel is excused, if state law requires that all claims be brought in the initial collateral review proceeding ... and if in that proceeding there was no counsel or counsel was ineffective.” *Ramirez*, 937 F.3d at 1241 (citing *Martinez*, 566 U.S. at 17). Nevada law requires prisoners to raise ineffective assistance of counsel (“IAC”) claims for the first time in a state petition seeking post-conviction review, which is the initial collateral review proceeding for the purposes of applying the *Martinez* rule.² See *Rodney v. Filson*, 916 F.3d 1254, 1259-60 (9th Cir. 2019).

To establish cause and prejudice to excuse the procedural default of a trial-level IAC claim under *Martinez*, a petitioner must show that:

- (1) post-conviction counsel performed deficiently; (2) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different, and (3) the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

² The Nevada Supreme Court does not recognize *Martinez* as cause to overcome a state procedural bar pursuant to Nevada law. *Brown v. McDaniel*, 130 Nev. 565, 571-76, 331 P.3d 867, 871-75 (2014) (en banc). Thus, a Nevada habeas petitioner who relies on *Martinez*—and only *Martinez*—as a basis for overcoming a state procedural bar on an unexhausted claim can successfully argue that the state courts would hold the claim procedurally barred, but that he nonetheless has a potentially viable argument for cause and prejudice under federal law.

1 *Ramirez*, 937 F.3d at 1242 (internal quotation omitted). The first and second
2 “cause” prongs of the *Martinez* test are derived from *Strickland v. Washington*,
3 466 U.S. 668 (1984). *See Ramirez*, 937 F.3d at 1241. Determination of the
4 second prong—whether there was a reasonable probability that the result of the
5 post-conviction proceedings would be different—“is necessarily connected to the
6 strength of the argument that trial counsel’s assistance was
7 ineffective.” *Id.* (quoting *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir.
8 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 819 (9th
9 Cir. 2015) (en banc)). The third “prejudice” prong directs courts to assess the
10 merits of the underlying IAC claim. *See id.* A procedural default will not be
11 excused if the underlying IAC claim “is insubstantial,” *i.e.*, it lacks merit or
12 is “wholly without factual support.” *Id.* (quoting *Martinez*, 566 U.S. at 14-16).

13 Here, it is clear that Petitioner would face multiple procedural bars if he
14 were to return to state court with his unexhausted claims. *See*,
15 *e.g.*, NRS 34.726, 34.810. Petitioner advances only *Martinez* as a basis for
16 excusing the anticipatory default of his ineffective assistance of counsel
17 claims. The Court thus reads Petitioner’s opposition as a concession that the
18 only basis for cause as to any of the unexhausted ineffective assistance of trial
19 counsel claims would be *Martinez*, and will consider said claims technically
20 exhausted on that basis.

21 Petitioner requests, in the alternative, deferring ruling on whether
22 Grounds 1(C), 1(D), 1(F), and Ground 2, as it relates to those claims, are
23 procedurally defaulted. Given the fact-intensive nature of the claims and
24 Petitioner’s cause and prejudice arguments, the Court agrees that these
25 questions are inextricably intertwined with the merits of the claims themselves.
26 Accordingly, the Court will defer a determination on whether Petitioner can
27 demonstrate cause and prejudice until the time of merits determination. The
28 motion to dismiss Grounds 1(C), 1(D), 1(F), and Ground 2, as it relates to those

claims, is denied without prejudice. Respondents may renew the procedural default argument as to these claims in their answer.

III. Conclusion

It is therefore ordered that Respondents' Motion to Dismiss (ECF No. 35) is denied as follows:

- Ground 1(E) is exhausted.
- The Court defers consideration of whether Petitioner can demonstrate cause and prejudice under *Martinez* to overcome the procedural default of Grounds 1(C), 1(D), 1(F), and Ground 2, as it relates to those claims, until the time of merits review. Respondents may assert the procedural default argument with respect to these claims in their answer.

It is further ordered that within 60 days of entry of this order, Respondents must file an answer.

It is further ordered that Petitioner will have 60 days from service of the answer within which to file a reply.

DATED THIS 9th day of August 2023.



ANNE R TRAUM
UNITED STATES DISTRICT JUDGE